

RETURN-TO- WORK TRAINING

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April 6, 2011

MEDICAL APPEALS

- Departments' obligations under the civil service laws and FEHA are separate and distinct from their obligations under workers' compensation laws. (Ingersoll 00-01)

REASONABLE ACCOMMODATION

- A department must make a reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless it will create an undue hardship. (Government Code section 19230, subd. (c))

REASONABLE ACCOMMODATION

- When determining whether there has been an illegal denial of reasonable accommodation, SPB will apply the definitions set forth in the FEHA, unless the ADA offers greater protection.

REASONABLE ACCOMMODATION

- Board Rule 64.3
 - Employee may file a complaint with the appointing power within one year from when the denial of RA occurred.

REASONABLE ACCOMMODATION

- Board Rules 64.4
 - Appointing power must respond within 90 days.
 - Complaint must be filed with the SPB within 150 days after the employee filed denial of RA complaint with the appointing power.

REASONABLE ACCOMMODATION

- Department must engage in an interactive process with an employee who requests a reasonable accommodation. (Henning 05-01)

REASONABLE ACCOMMODATION

- Interactive Process
 - analyze purpose and essential functions of job
 - consult with employee to determine job-related limitations

REASONABLE ACCOMMODATION

- Interactive Process (cont.)
 - consult with employee to identify and assess potential accommodations
 - implement an accommodation that is most appropriate for employee and employer, taking into consideration the preference of the employee

REASONABLE ACCOMMODATION

- Department has an obligation to interact with employee even if employee's request for an accommodation is not reasonable.
- Department has a continuing obligation to interact with employee if initial reasonable accommodation is not successful.

REASONABLE ACCOMMODATION

- An appeal from denial of reasonable accommodation states a cause of action for disability discrimination under Government Code § 19702.
- An appellant may obtain compensatory damages for an illegal denial of reasonable accommodation. (Reece 02-06)

REASONABLE ACCOMMODATION

- “[A]n employee is not entitled as an accommodation to reassignment to a position in a different civil service classification without complying with the competitive examination process of the civil service laws.” (Hastings v. Department of Corrections (2003) 110 Cal.App.4th 963)

MEDICAL ACTIONS

- Government Code section 19253.5
 - Medical termination, demotion or transfer
 - Disability retirement application and involuntary leave

MEDICAL ACTIONS

- Under Government Code section 19253.5, subd(a):
 - a department may send an employee for a fitness for duty exam
 - FEHA
 - CMIA

MEDICAL ACTIONS

- Purpose - to "evaluate the capacity of the employee to perform the work of his or her position."
- Section 19253.5, subd. (a) does not allow employees to place restrictions on the scope of the medical examination the doctor may conduct. (Cole 94-27)

MEDICAL ACTIONS

- An employee has the right to a copy of the medical or psychiatric report upon which a department relies to take medical action. (Armstead 03-02; Brown v. State Personnel Board)

MEDICAL ACTIONS

- Under Government Code 19253.5, subd. (c):
 - A department may transfer or demote an employee who is unable to perform the work of his/her current position, but is able to perform the work of another position.

MEDICAL ACTIONS

- Department need not waive minimum qualifications of any job when medically transferring or demoting an employee. (Manriquez 97-05)

MEDICAL ACTIONS

- Under Government Code §19253.5, subdivision (d):
 - Department may medically terminate an employee who is:
 - unable to perform current position, or any other position, and
 - does not qualify for or waives right to retire for disability.

MEDICAL ACTIONS

- Department must review all vacant positions into which employee could be medically demoted or transferred before medically terminating.
- But department is not required to create a new or light duty position as a reasonable accommodation. (Solis 00-07)

MEDICAL ACTIONS

- Under Government Code section 19253.5, subd. (f) and Board Rule 52.6:
 - Department must give employee 15 days' notice and a Skelly meeting.
 - Employee has 15 days from day notice is served to file an appeal with SPB.

MEDICAL ACTIONS

- Notice must inform employee that medical action is being taken in accordance with Government Code § 19253.5 and apprise employee of appeal rights. (Poggione 95-12)

MEDICAL ACTIONS

- Under Government Code section 19253.5, subd. (g)
 - If SPB revokes a medical action, employee will be entitled to backpay and benefits in accordance with Government Code § 19584. (Davies 00-04)

MEDICAL ACTIONS

- Under Government Code section 19253.5, subd. (h):
 - Request to SPB for reinstatement
 - If SPB agrees, reinstatement is mandatory if there is a vacant position available.
 - if there is no vacant position, the employee's name will be placed on an appropriate list.

MEDICAL ACTIONS

- Government Code section 19253.5, subd. (h) (cont.):
 - SPB may require a new probationary period.
 - Reinstatement rights may be waived by agreement. (Johnson 96-03)

MEDICAL ACTIONS

- Department must engage in an interactive process before taking any medical action against employee under Government Code § 19253.5. (Henning 05-01)

MEDICAL ACTIONS

- **Disability Retirement**
 - A department shall file an application for disability retirement for an employee who cannot perform the duties of any job, and is eligible for and has not waived disability retirement. (Government Code section 19253.5, subd. (i))

MEDICAL ACTIONS

- **Disability Retirement**
 - Department must give employee 15 days' written notice and a reasonable opportunity to respond.
 - Department must comply with Skelly notice requirements.
 - Department may place employee on involuntary leave status.

MEDICAL ACTIONS

- **Disability Retirement**

- If employee is placed on involuntary leave status, department must pay an interim disability allowance if employee has exhausted all accrued leave credits and programs.
- Department must also continue to make contributions toward health plans.

MEDICAL ACTIONS

- **Disability Retirement**

- If PERS approves disability retirement, PERS will reimburse appointing power.
- If PERS denies, employee must be reinstated with lost backpay and benefits, less any interim disability allowance paid by appointing power.

CONSTRUCTIVE MEDICAL ACTIONS

- Appeals to SPB from constructive medical termination, demotion or suspension
 - SPB precedential decision

CONSTRUCTIVE MEDICAL ACTIONS

- Three prerequisites for establishing:
 - 1) Employee asserted to his/her appointing power that s/he was ready, willing and able to work under circumstances that indicated that s/he, in all good faith, wished to return to work and perform the essential functions of her/his job with or without a reasonable accommodation.

CONSTRUCTIVE MEDICAL ACTIONS

- 2) Appointing power refused to allow employee to work in his/her position for asserted medical reasons, but did not comply with the procedural due process requirements set forth in Government Code section 19253.5 and Board Rule 52.6; and

CONSTRUCTIVE MEDICAL ACTIONS

- 3) Employee has a vested interest in his/her position that has never been legally terminated either through resignation or other appropriate means in compliance with Skelly's due process requirements. (Beck 02-02)

CONSTRUCTIVE MEDICAL ACTIONS

- Circumstances in which a constructive medical termination, suspension or demotion may occur:
 - After PERS denies disability retirement application (Mason 93-08)

CONSTRUCTIVE MEDICAL ACTIONS

- When an employee who is not eligible for disability retirement is placed off work without following the procedures in Government Code section 19253.5 (Armstead 97-01)

CONSTRUCTIVE MEDICAL ACTIONS

- When a department fails to return an employee to work after his/her treating doctor has released him/her to return to work (Ingersoll 00-01)

CONSTRUCTIVE MEDICAL ACTIONS

- When a department denies employee who has voluntarily medically demoted mandatory reinstatement rights (DeFord 92-05)

CONSTRUCTIVE MEDICAL ACTIONS

- When an employer fails to return an employee to work in response to her request, after she had been declared to be a “qualified injured worker” in her workers’ compensation action, without complying with procedural due process requirements (Beck 02-02)

CONSTRUCTIVE MEDICAL ACTIONS

- An appointing power may place an employee on paid leave pending a fitness for duty exam if reasonable, good faith belief that an employee's medical or psychological condition may pose a risk to the health or safety of him or herself or others.
(Armstead 03-02)

CONSTRUCTIVE MEDICAL ACTIONS

- Due Process considerations

- A permanent civil service employee has a due process right to notice and an opportunity to be heard before s/he can be placed on non-work status and denied his/her pay. (Brown v. State Personnel Board)

CONSTRUCTIVE MEDICAL ACTIONS

- Remedy for a Due Process Violation
 - Employees who are denied their due process rights are entitled to backpay, even if they are not “ready, able and willing” to work. (Brown 01-02)

EMPLOYMENT ACTIONS

- Adverse Action
- Performance Inadequacies
 - While an employer may discipline employee for performance deficiencies and may hold employee to same standards of conduct as other employees, it may not discipline an employee for performance deficiencies related to a disability that the employer has failed to reasonably accommodate.
(Silverman 07-01)

EMPLOYMENT ACTIONS

- Adverse Action
 - Performance Inadequacies
 - Before dismissing an employee with a disability for inadequate performance, department must first explore, through a flexible interactive process, whether the employee could perform the essential functions of the existing job, or a reassigned job, with a reasonable accommodation. (Gabriault 01-03)¹⁴

EMPLOYMENT ACTIONS

- Adverse Action
 - Performance Inadequacies
 - BUT, employer not required to rescind prior discipline for misconduct related to a disability, if the employer was not aware of the employee's need for accommodation.

EMPLOYMENT ACTIONS

- ## Adverse Action

- Absenteeism (Allen 95-06; Carver 96-18)
 - But see, FEHA/ADA (Humphrey v. Memorial Hospitals Association (2001) 239 F.3d 1128)
 - See also, FMLA/CFRA (Dudley v. Department of Transportation (2001) 90 Cal.App.4th 255; Mora v. Chem-tronics, Inc. (1998) 16 F.Supp.2d 1192)

EMPLOYMENT ACTIONS

- Adverse Action
 - Other Misconduct
 - Alcoholism (Wendt 95-16)
 - Drug Addiction (Wolford 93-17;
Brown v. Lucky Stores (2001) 246
F.3d 1182)

EMPLOYMENT ACTIONS

- Adverse Action
 - Other Misconduct
 - Violence, threats, etc.
 - Department need not accommodate disability if the disability causes the employee to engage in threatening or violent conduct.

EMPLOYMENT ACTIONS

- Rejection during probation
 - An employee with a disability may not be rejected during probation on the basis of that disability, but is entitled to reasonable accommodation, including reassignment to a vacant position. (Casado 98-01)

EMPLOYMENT ACTIONS

- Rejection during probation
 - A department and probationary employee, with consent of SPB, may extend a probationary period for a period not to exceed 6 months to provide for a reasonable accommodation. (Government Code section 19170; Board Rule 321)

EMPLOYMENT ACTIONS

- Non-punitive termination
 - An employee who fails to renew her license while on leave for a work-related injury cannot be non-punitively terminated.
(Foreman 98-04)

EMPLOYMENT ACTIONS

- Non-punitive termination
 - An employee cannot be non-punitively terminated while his request for disability retirement is pending before PERS.
(Papadakis 97-07)

SUMMARY

- Reasonable accommodation
- Continuing obligation to engage in the interactive process
- Due process protections against constructive medical termination
- Medical actions must comply with procedural requirements
- Employment actions must consider disability issues